the defendant's story being true. There is the very near coincidence of the figure in Exhibit 1, $3,356 with the total of the figures in Exhibit 9, $3,355.55. There is the fact that the four plaintiffs (with the other 6 persons named in Exhibit 1) were then because of the previous "hwei" transactions all owed money by the defendant and the successful tenderers in the three "hweis". There is the obvious fact (there is no other even possibly acceptable explanation) that Exhibit 9 was made before, and as a prelude to, Exhibit 1.

The court accordingly holds that Exhibit 9 sets out the particulars of the total monies owed by the defendant and the successful tenderers in the three "hweis", between them, to the four plaintiffs and the other six persons named. It also holds that there was no loan and were no loans on (or about) the 12th of November 1962 to the defendant by the four plaintiffs, or any of them.

It follows that the plaintiffs have totally failed to prove a fundamental part of their case, the consideration for the alleged contract to repay. Exhibit 1 is on its face a promissory note, which in addition to the promise to pay on a certain date shows the consideration for the promise and contains an agreement to deposit title as collateral security. The consideration shown in the note, and alleged by the plaintiffs, has been held by the court not to exist, and the plaintiffs' claim fails.

The plaintiffs' claim is dismissed, with costs to the defendant. Costs to be taxed.

Claim dismissed.

TINIT & ORS. v. PUBLIC PROSECUTOR (No. 2)

[A.Cr.J. (McGilligan J.) February 8, 1964]

[Sibu — Criminal Appeal No. 17 of 1963]

Evidence — Retracted Confession — Accomplice evidence — Corroboration — Penal Code, s. 380.

In this case the accused persons were charged with theft alternatively dishonestly retaining stolen property. One of the accused pleaded guilty and his plea was accepted and he was convicted. Later he gave evidence for the prosecution. Some of the accused made confessions in cautioned statements to the police but at the trial all except one retracted their confessions. The appellants appealed against their conviction and the main ground of appeal was that the learned magistrate had failed to direct himself that it was unsafe to convict a person on the uncorroborated evidence of an accomplice and also as to what constituted corroboration in law.

Held: (1) as the learned magistrate, who was a legally qualified stipendiary magistrate, considered that there was no corroboration in this case there was no arguable reason for saying that he should have directed himself as to the kind of corroboration required;

(2) the fact that a voluntary confession is later retracted at the trial does not detract very much from its weight, once it has been accepted that it was made completely voluntarily;

(3) there was in this case corroborative evidence in the confessions, voluntarily made, even though they were subsequently retracted;

(4) the learned magistrate was prepared to convict on the uncorroborated evidence of the accomplice and the court saw no reason to hold him wrong in doing so.

[**Editorial Note:** This report is concerned with that part of McGilligan J.'s judgment on retracted confession and corroboration of accomplice's evidence. The concluding part of his Lordship's judgment dealing with Prison Rules has already been reported, *ante*, p. 151.]

Cases referred to:—

(1) *Sinaraju* v. *Public Prosecutor* [1961] M.L.J. 33.

(2) *Yap Seow Keng* v. *Public Prosecutor* [1947] M.L.J. 90.

(3) *Sayang bin Osman* v. *R.* [1956] S.C.R. 113.

MAGISTRATE'S CRIMINAL APPEAL.

C. T. Wong for Bendinang, Miring, Kalang and Gindi.

The other appellants in person.

J. W. Williams (Deputy Public Prosecutor) for the Public Prosecutor.

Cur. Adv. Vult.

McGilligan J.: The ten appellants and another man called Nyaru anak Nuin were charged on the 8th of October 1963 on the following charges:—

"That you, between the 15th day of September, 1963 and the 17th day of September 1963, at Oya Road, Sibu, committed from a building used for the custody of property, the theft of merchandise to the approximate value of dollars three thousand four hundred and forty and cents eighty five, by dishonestly taking the said property out of the possession of HO CHIN SOON (m) and you thereby committed an offence punishable under section 380 of the Penal Code.

Alternatively

That you, between the 15th day of September, 1963 and the 18th day of September, 1963, dishonestly retained stolen property, to wit, merchandise to the approximate value of dollars three thousand four hundred and forty and cents eighty five, belonging to HO CHIN SOON (m), which said property you knew or had reason to believe to be stolen property, and you thereby committed an offence punishable under section 411 of the Penal Code.".

All 11 accused (the 10 appellants and Nyaru) claimed trial on both charges.

The trial began on the 4th of November 1963. During the course of the case for the prosecution Tinit anak Atap, the first appellant, changed his plea to one of guilty and his plea was accepted by the court. He was therefore convicted and sentenced to fifteen months' imprisonment. Later he gave evidence for the prosecution.

At the close of the prosecution case Nyaru anak Nuin was acquitted, and he is not concerned in this appeal.

The other nine appellants, appellants number

two to number ten, were convicted at the end of the whole case, and after they had made their defences, of the offence set out in the first of the two alternative charges, that is of the offence of theft in a building punishable under section 380 of the Penal Code.

The first appellant, in his written petition of appeal, stated that he wished to appeal against severity of sentence. At the hearing, however, by asking to be acquitted he attempted to appeal against his conviction also. He was not able to say very much for himself, other than that he had not joined in the stealing. He said "Government asked me and I had to tell the Government". He re-iterated that it was true that the others took the things, but said again "I did not offend against the Government". He had nothing at all to say on the subject of sentence.

The third, eighth, seventh and sixth appellants, by name respectively Ambol anak Uyang, Kamarau anak Likong, Belong anak Panjang, and Anyi anak Kemping — who were not legally represented — in their petition of appeal stated:—

"2. Your petitioners are dissatisfied with the said judgment on the grounds following:—

They never steal anything from canteen at Oya Road and there were no stolen properties in their homes.

3. Your petitioners pray that such judgment or sentence may be reversed or that such other order may be made theron as justice may require.".

The fourth appellant, Tagup anak Kemping, also not legally represented in his petition of appeal stated:—

"2. Your petitioner is dissatisfied with the said judgment on the grounds following:—

1. He never steal nor was there any stolen property in his home.

2. Cloth and clothing found in his possession were bought from the money receiving from the sale of land to Mr. Lee Cho of Lands & Surveys.

3. Your petitioner prays that such judgment or sentence may be reversed or that such order may be made thereon as justice may require.".

These five appellants stated at the hearing that they had nothing to add to what was contained in their petition.

The ninth, tenth, eleventh and fifth appellants, by name respectively Bedinang anak Baruang, Miring anak Nyelang, Kalang anak Buang and Gindi anak Pua, were represented by Mr. C. T. Wong. Their original grounds of appeal were:—

"....

(a) That the conviction cannot be supported having regard to the evidence.

(b) That the sentences passed on your petitioners are excessive. Further grounds of appeal will be submitted soon after our advocates, Messrs. Yong and Wong, Sibu have obtained the copy of the judgment and the records of the proceedings.".

Further grounds of appeal were later put in, which read as follows:—

"1. The learned trial Magistrate had failed to direct himself as to what would constitute 'corroboration' in law.

2. The learned trial Magistrate had failed to give proper and/or adequate warning to himself that it would be extremely unsafe to convict a person on the uncorroborated evidence of an accomplice."

Before going on to summarise Mr. Wong's argument it is convenient to set out here some of the facts of the case. All the accused, except Nyaru, and Belong (sixth appellant) and Kalang (tenth appellant) made confessions (cautioned statements to police officers) admitting their participation in the offence charged (the learned trial magistrate apparently did not notice that Belong had made no statement). All who had confessed, except Tinit, retracted their confessions during the course of the trial. Nevertheless, the statements of all of them were ruled by the learned trial magistrate (after in each case a trial within a trial) as being admissible, and he therefore accepted that they were all made voluntarily. In the cases of the first appellant, the fifth appellant, the seventh appellant and the ninth appellant, articles and clothing were found in the room of each of them, which by their quantity and description must almost certainly have been part of what was stolen from the canteen. For some reason, neither of the canteen-operators was asked to say whether or not the articles found were articles stolen, but Ho Chin Chee (one of them) did say that on 21.9.63 he went to the Central Police Station and there identified some goods as belonging to the shop (by which he obviously meant the canteen). Further, there were found on a spot of the road about ½ a mile from the canteen some sacks of of rice and of soap which clearly must have come from the canteen.

To return to Mr. Wong's argument — that part of it, the main part, which referred to the eleventh appellant, the one who had not confessed (the learned Deputy Public Prosecutor later pointed out that these arguments also applied, for what they are worth, to Belong, who also had not confessed) — I think it may be summarised as follows:—

(a) the only evidence against Kalang was that of Tinit anak Atap;

(b) Tinit was an accomplice;

(c) the learned trial magistrate, though mentioning the danger of convicting on the evidence of an accomplice when there is no corroboration, did not properly warn himself of that danger;

(d) the learned trial magistrate appeared to regard some of the other evidence as corroboratory of Tinit's evidence, but did not

direct himself as to the meaning of corroboration;

(e) if there was no corroboration (as Mr. Wong says there was not) the failure of the learned trial magistrate to give himself a proper warning, or, if there was corroboration, his failure to direct himself as to the meaning of corroboration, was fatal to his judgment, and the conviction of Kalang should be quashed.

For those of his clients who had made confessions Mr. Wong did not feel himself able to argue very strongly against the convictions. However, his argument in respect of Kalang can in a way be applied to them also. It may be argued *first* that a retracted confession is very poor evidence, and should not be given weight at all unless there is other evidence pointing to the accused's guilt; and *second* that, because of the magistrate's failure properly to warn or direct himself, Tinit's evidence must be disregarded, and *third* that therefore all there was in effect against these other appellants/accused was their retracted confessions.

Having carefully considered all the arguments, including the able one of the learned Deputy Public Prosecutor, the court has formulated the following opinions:—

(1) The learned trial magistrate did not find any corroboration; he merely mentioned certain generally supporting evidence; in fact it is clear that he considered there was no evidence corroborative of Tinit's, and yet was prepared to, and did, convict on his evidence alone, pointing out — at the same time — that the retracted confessions of those who confessed were also sufficient to convict them.

(2) The learned trial magistrate did give himself — in the second last paragraph of the second page of his judgment — an adequate (though no more) warning as to the danger of convicting on the uncorroborated evidence of an accomplice.

(3) As the learned trial magistrate considered there was no corroboration there is not even an arguable reason for saying that he should have directed himself as to the kind of corroboration required. In any event, in my judgment, a magistrate or a judge sitting alone (without assessors or a jury) is not in the least obliged, when considering the evidence of an accomplice, to direct himself as to the kind of corroboration required for an accomplice's evidence. To argue that he should direct himself is to argue only that he should set out in his judgment such details as to show that he knows the kind of corroboration required. Why should any magistrate (particularly a legally qualified Stipendiary Magistrate, as is the one in this case) be put, as it were, on examination like this? The assessors, or a jury, have to be directed on corroboration, by a man who knows the law, because they are ignorant of the law. But the man who knows the law, in this case the magistrate, (who, if there were assessors, would have directed them out of his own knowledge of the law) must be taken to have the necessary knowledge in his head, without demonstrating it (for the only benefit of the appeal court, one would have to presume). To illustrate, suppose that in a certain case the main prosecution witness was an accomplice, and there was other evidence in law corroborative of his, and the magistrate concerned, having said this was corroboration, convicted the accused, could it then be argued that because he failed to direct himself as to the meaning of corroboration his obviously correct decision must be reversed? In my opinion it could not.

(4) There was as a matter of fact, in this court's opinion, corroborative evidence except in the cases of Kalang and Belong; the retracted confessions — once found to have been voluntarily made — were very good corroboration; also in the cases of the first, fifth, seventh and ninth appellants the clothing and articles found in their rooms taken with the fact of the breaking into the canteen and the stealing of clothing and articles from it amounted to corroboration; this is not, however, a ground for upsetting the learned trial magistrate's judgment. He was prepared to convict without corroboration. How much more readily would he have done so had he considered there was corroboration?

(5) The retracted confessions are by themselves sufficient evidence on which to convict each of the appellants who made one. A confession, once it has been accepted as voluntary (as these were after trials within the trial) is to my mind the strongest of evidence, only to be discounted by showing insanity at the time of making, or by showing that the maker was lying for reason proved, or that what is stated in it could not be true. The fact that a voluntary confession is later retracted at the trial does not to me detract very much from its weight, once it has been accepted that it was made completely voluntarily. According to *Monir* on Evidence the Indian courts seem to tend to the view that an accused should not be convicted on a retracted confession unless there is other evidence showing that what is stated in it is true. But that is not the view

taken by the courts in Sarawak or Malaya, as may be seen from the decisions in the cases of *Sinaraju* v. *Public Prosecutor*,[1] *Yap Seow Keng* v. *Public Prosecutor*,[2] and the Sarawak Case of *Sayang bin Osman* v. *Regina*,[3] which followed the ruling in the *Yap Seow Keng* case.

(6) Further, the evidence of Tinit, even if uncorroborated, was acceptable evidence to support — to corroborate in a different sense — the truth of the retracted confessions.

As to the appellants against whom there was both Tinit's evidence and their own confessions (*albeit* retracted) it is clear their appeal against conviction must fail. As to the others the learned trial magistrate, having duly warned himself was prepared to, and did, convict on the uncorroborated evidence of Tinit alone (in fact the learned trial magistrate, on his own view of the facts, convicted all the appellants on the uncorroborated evidence of Tinit), and this court sees no reason to hold him wrong in so doing. The appeals of all the appellants against conviction are dismissed.

As to Tinit himself he pleaded guilty, and his plea was accepted, quite properly in the circumstances, by the trial magistrate. He attempted to appeal against conviction as well as sentence, but cannot be heard to do so. It may be mentioned that there is also against him his own, unequivocal, and not retracted (except inasmuch as he tried to go back on it in the hearing of this appeal) confession.

As to the sentences imposed this court cannot see that they are in the circumstances inappropriate, (except in the case of Bedinang, who is only 17 years old) or in any way excessive. The appeals against sentences of all the appellants, except Bedinang, are dismissed.

Bedinang claims to be seventeen. This claim was accepted by the learned Deputy Public Prosecutor and by this court. He must be approaching 18 years old, however, and this court cannot see that either he or the Sarawak Boys' Home would benefit by his being sent there. Instead his sentence of 15 months' imprisonment is reduced to one of 6 months.

Appeals dismissed.

M.I. & M. CORPORATION & ANOR. v. A. MOHAMED IBRAHIM

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) and Wee Chong Jin C.J. (Singapore) February 24, 1964]

[Singapore — Federal Court Civil Appeal No. 38 of 1963]

Trade Mark — Infringement and passing off — Trade mark so nearly resembling another as to be likely to deceive — Test to be applied.

Practice and Procedure — Costs — Preparation of record of appeal — Duty of solicitors — Restraint in incurring costs.

In this case the original plaintiff commenced proceedings against the defendants claiming that they had infringed his registered trade mark and had passed off their goods as his. The goods were cooking oil and the registered trade mark was that of a hibiscus flower with red petals and green leaves. The label used by the defendants for their goods was that of a sun flower with green leaves on a yellow background. The plaintiff died before the trial of the action and his personal representatives continued the action. The learned trial judge gave judgment ([1963] M.L.J. 232) against the defendants, who appealed.

Held: (1) the question whether a device used as a trade mark so nearly resembles another as to be likely to deceive or cause confusion is a question of fact;

(2) the test to be applied is whether a person who sees the one trade mark in the absence of the other trade mark and in view only of his general recollection of what the nature of the other trade mark was, would be liable to be deceived and to think that the trade mark is the same as the other of which he has a general recollection. This recollection test is to be applied having regard to the sort of people who would buy the goods and the circumstances in which they buy;

(3) in this case the flower device used by the appellants was likely to deceive or cause confusion and so enable the appellants to pass off their goods as and for the goods of the respondents.

Semble: It is the duty of solicitors to exercise the greatest possible restraint in incurring costs and if this is not done the court will have to consider ways of penalising those who fail in their duty.

Cases referred to:—

(1) *Rysta Ltd's Application* (1943) 60 R.P.C. 87 at p. 105.

(2) *Seixo* v. *Provezenda* (1865) 1 Ch. D. 192.

(3) *Sandow Ltd's Application* (1914) 31 R.P.C. 196 at p. 205.

(4) *Lim Siew Neo* v. *Pang Keah Swee* [1958] M.L.J 111, P.C.

(5) *Amar Singh* v. *Chin Kiow* [1960] M.L.J. 77.

FEDERAL COURT.

L. A. J. Smith for the appellants.

E. W. Barker for the respondent.

Cur. Adv. Vult.

Thomson L.P.: This is an appeal in a trade mark case against a decision of the High Court in Singapore.

The original plaintiff, who is now dead, and, after his death, his representatives carried on the business of making and selling cooking oil consisting of a mixture of palm oil, mutton fat and coconut oil. This unattractive but no doubt wholesome substance was packed in tins of various sizes each of which bore a yellow label. This label had on it printed matter in red and green which, among other things, set out the plaintiff's name and stigmatised the contents as "Chop Bunga" or "Flower Brand". There was also a picture of a flower of the hibiscus type